

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VARIANT HOLDINGS, LLC
AND VARIANT, INC.,

Plaintiffs

V.

HILTON HOTELS HOLDINGS LLC et al.,

Defendants

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Civil Action No. 2:11-cv-427-DF

**DEFENDANT FERTITTA HOSPITALITY, INC.'s
ORIGINAL ANSWER, DEFENSES, AND COUNTERCLAIMS**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Defendant Fertitta Hospitality, Inc. d/b/a/ Hilton Galveston Island Resort (“Defendant”) respectfully submit this Answer and Counterclaims to Variant Holdings, LLC’s and Variant, Inc.’s (together “Plaintiffs”) First Amended Complaint for Patent Infringement (the “Amended Complaint”). Except as is expressly admitted in this answer, Defendant denies each allegation contained in the Complaint.

In response to the specific allegations in the Complaint, Defendant states as follows:

PARTIES

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Amended Complaint and therefore denies the same.
2. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Amended Complaint and therefore denies the same.
3. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the Amended Complaint and therefore denies the same.
4. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 of the Amended Complaint and therefore denies the same.

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Amended Complaint and therefore denies the same.

6. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Amended Complaint and therefore denies the same.

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Amended Complaint and therefore denies the same.

8. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Amended Complaint and therefore denies the same.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Amended Complaint and therefore denies the same.

10. Defendant admits it has a place of business in Galveston, Texas. Defendant denies any remaining allegation in paragraph 10 of the Amended Complaint.

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Amended Complaint and therefore denies the same.

12. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Amended Complaint and therefore denies the same.

13. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

15. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Amended Complaint and therefore denies the same.

16. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Amended Complaint and therefore denies the same.

17. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the Amended Complaint and therefore denies the same.

18. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the Amended Complaint and therefore denies the same.

19. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the Amended Complaint and therefore denies the same.

20. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the Amended Complaint and therefore denies the same.

21. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint and therefore denies the same.

22. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint and therefore denies the same.

23. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint and therefore denies the same.

24. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24 of the Amended Complaint and therefore denies the same.

25. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 of the Amended Complaint and therefore denies the same.

JURISDICTION AND VENUE

26. Defendant admits that Plaintiffs' Amended Complaint purports to be an action for patent infringement arising under the patent laws of the United States. Defendant admits that this Court has subject matter jurisdiction. Defendant denies any remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant admits that it is subject to personal jurisdiction, but denies that it has committed any acts of infringement. Defendant denies the remaining allegations in paragraph 27 of the Amended Complaint. To the extent paragraph 27 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Amended Complaint and therefore denies the same.

28. Defendant lacks sufficient information about the allegations in this case to determine whether venue is proper in this judicial district, and therefore denies that venue is proper. Defendant reserves the right to ask this Court to sever and/or transfer the case to a more convenient forum. Defendant admits that it is subject to personal jurisdiction in this judicial district, but denies that it has committed any acts of infringement. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 28 of the Amended Complaint and therefore denies the same.

COUNT I
INFRINGEMENT OF U.S. PATENT NO. 7,624,044

29. Defendant admits that the title on the face of U.S. Patent No. 7,624,044 (the “’044 patent”) is “System for Marketing Goods and Services Utilizing Computerized Central and Remote Facilities.” Defendant admits that the issue date on the face of the ’044 patent is November 24, 2009, but Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 29 of the Amended Complaint and therefore denies the same.

30. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 of the Amended Complaint and therefore denies the same.

31. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant denies the allegations in paragraph 32 of the Amended Complaint. To the extent paragraph 32 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32 of the Amended Complaint and therefore denies the same.

33. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33 of the Amended Complaint and therefore denies the same.

34. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 of the Amended Complaint and therefore denies the same.

35. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35 of the Amended Complaint and therefore denies the same.

36. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 of the Amended Complaint and therefore denies the same.

37. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37 of the Amended Complaint and therefore denies the same.

38. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38 of the Amended Complaint and therefore denies the same.

39. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 of the Amended Complaint and therefore denies the same.

41. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 of the Amended Complaint and therefore denies the same.

42. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42 of the Amended Complaint and therefore denies the same.

43. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 of the Amended Complaint and therefore denies the same.

44. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44 of the Amended Complaint and therefore denies the same.

45. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45 of the Amended Complaint and therefore denies the same.

46. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46 of the Amended Complaint and therefore denies the same.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 of the Amended Complaint and therefore denies the same.

50. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50 of the Amended Complaint and therefore denies the same.

51. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51 of the Amended Complaint and therefore denies the same.

52. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52 of the Amended Complaint and therefore denies the same.

53. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53 of the Amended Complaint and therefore denies the same.

54. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54 of the Amended Complaint and therefore denies the same.

55. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55 of the Amended Complaint and therefore denies the same.

56. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56 of the Amended Complaint and therefore denies the same.

57. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 of the Amended Complaint and therefore denies the same.

58. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58 of the Amended Complaint and therefore denies the same.

59. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 of the Amended Complaint and therefore denies the same.

60. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60 of the Amended Complaint and therefore denies the same.

61. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61 of the Amended Complaint and therefore denies the same.

62. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62 of the Amended Complaint and therefore denies the same.

63. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 of the Amended Complaint and therefore denies the same.

64. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64 of the Amended Complaint and therefore denies the same.

65. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65 of the Amended Complaint and therefore denies the same.

66. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 of the Amended Complaint and therefore denies the same.

67. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 67 of the Amended Complaint and therefore denies the same.

68. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 68 of the Amended Complaint and therefore denies the same.

69. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69 of the Amended Complaint and therefore denies the same.

70. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 of the Amended Complaint and therefore denies the same.

71. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71 of the Amended Complaint and therefore denies the same.

72. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72 of the Amended Complaint and therefore denies the same.

73. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73 of the Amended Complaint and therefore denies the same.

74. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 74 of the Amended Complaint and therefore denies the same.

75. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 75 of the Amended Complaint and therefore denies the same.

76. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76 of the Amended Complaint and therefore denies the same.

77. Defendant denies the allegations in paragraph 77 of the Amended Complaint. To the extent paragraph 77 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 77 of the Amended Complaint and therefore denies the same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint. To the extent paragraph 78 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 78 of the Amended Complaint and therefore denies the same.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint. To the extent paragraph 79 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79 of the Amended Complaint and therefore denies the same.

80. Defendant denies the allegations in paragraph 80 of the Amended Complaint. To the extent paragraph 80 is directed to other named defendants, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 80 of the Amended Complaint and therefore denies the same.

PRAYER FOR RELIEF

Defendant denies that Plaintiffs are entitled to any of the relief sought in the prayer for relief.

DEMAND FOR JURY TRIAL

Plaintiffs' request for a jury trial does not require a response by Defendant.

AFFIRMATIVE AND OTHER DEFENSES

Subject to the responses above, and without assuming any burden other than that imposed by operation of law, Defendant contends and asserts the following affirmative and other defenses in response to the allegations, undertaking the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated herein. In addition to the affirmative and other defenses described below, subject to the responses above, Defendant intends to conduct discovery and specifically reserves all rights to assert additional affirmative and other defenses that become known through the course of discovery or otherwise.

FIRST DEFENSE

Defendant does not infringe, and has not infringed, either literally or under the doctrine of equivalents, whether directly or indirectly, any valid claim of the '044 patent.

SECOND DEFENSE

The claims of the '044 patent are invalid because they fail to comply with the requirements for patentability specified in 35 U.S.C. § 101, et seq., including without limitation, Sections 101, 102, 103, and/or 112.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the equitable doctrines of unclean hands, estoppel, and waiver.

FOURTH DEFENSE

Any potential recovery by Plaintiffs is limited by various damages limitations, including without limitation by 35 U.S.C. §§ 286 and/or 287, and would be limited to those damages occurring only after notice of an allegation of infringement.

FIFTH DEFENSE

Plaintiffs fail to state a claim against Defendant upon which any relief may be granted.

SIXTH DEFENSE

Plaintiffs are not entitled to injunctive relief as, at a minimum, they have no irreparable injury, and they have an adequate remedy at law for any alleged infringement by Defendant.

COUNTERCLAIMS

1. Defendant Fertitta Hospitality, Inc. d/b/a Hilton Galveston Island Resort is a Texas corporation with a principal place of business at 1510 West Loop South, Houston, TX 77027

2. On information and belief, Plaintiff Variant Holdings, LLC is a limited liability company organized under the laws of the Federation of Saint Kitts and Nevis with a principal place of business in Charlestown, Nevis.

3. On information and belief, Plaintiff Variant, Inc. is a Wisconsin corporation with a principal place of business in McFarland, Wisconsin.

4. This is a claim for declaratory judgment arising under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.* This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201, and 2202.

5. Plaintiffs are subject to personal jurisdiction in this judicial district, at least because Plaintiffs have availed themselves of the Court for the present action.

6. Venue for these counterclaims is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(b).

COUNT I (Declaratory Judgment of Non-Infringement)

7. Defendant repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

8. Contrary to Plaintiffs' allegations, Defendant does not directly or indirectly infringe, literally or under the doctrine of equivalents, any claim of the '044 patent.

9. To resolve the factual and legal questions raised by Plaintiffs, and to afford relief from the uncertainty and controversy that Plaintiffs' accusations have precipitated, Defendant is entitled to a declaratory judgment that it does not infringe any claim of the '044 patent.

COUNT II (Declaratory Judgment of Invalidity)

10. Defendant repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

11. Contrary to Plaintiffs' allegations, the claims of the '044 patent are invalid under one or more sections of Title 35 of the United States Code, including without limitation, Sections 101, 102, 103, and/or 112.

12. To resolve the factual and legal questions raised by Plaintiffs, and to afford relief from the uncertainty and controversy that Plaintiffs' accusations have precipitated, Defendant is entitled to a declaratory judgment that the claims of the '044 patent are invalid.

DEFENDANT'S PRAYER FOR RELIEF

Defendant respectfully requests that this Court enter judgment in its favor and grant the following relief:

- (a) A declaration that Defendant does not infringe, either literally or under the doctrine of equivalents, whether directly or indirectly, any claim of the '044 patent;
- (b) A declaration that the claims of the '044 patent are invalid;
- (c) Dismissal of all of Plaintiffs' claims in their entirety with prejudice;
- (d) A declaration that Plaintiffs take nothing by way of their Amended Complaint;
- (e) An order awarding Defendant its costs;

(f) An order finding that this is an exceptional case and awarding Defendant its reasonable attorney fees pursuant to 35 U.S.C. § 285; and

(g) An order awarding such additional relief as the Court may deem appropriate and just under the circumstances.

DEMAND FOR JURY TRIAL

In accordance with Rule 38 of the Federal Rules of Civil Procedure, Defendant demands a jury trial of all issues triable to a jury in this action.

Dated: February 20, 2012.

Respectfully submitted,

/s/ Charles S. Baker
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**COUNSEL FOR DEFENDANT
FERTITTA HOSPITALITY,
INC. D/B/A HILTON
GALVESTON ISLAND
RESORT**

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2012, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Charles S. Baker